95-1712

Supreme Court, U.S.
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IN THE
SUPREME COURT of the UNITED STATES
OCTOBER TERM, 1995

INVESTORS EQUITY LIFE HOLDING COMPANY,
Petitioner,

v.

WAYNE C. METCALF, INSURANCE COMMISSIONER OF THE STATE OF HAWAII, AND INVESTORS EQUITY LIFE INSURANCE COMPANY OF HAWAII, LTD.,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Hawaii

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Supreme Court of the State of Hawaii erred in holding that the sole shareholder of a Hawaii insurer has no standing to oppose a petition by the State's Insurance Commissioner to liquidate the insurer, despite the shareholder's assertion that an involuntary liquidation of the insurer would violate the shareholder's right under the United States Constitution not to be deprived of its property without due process of law.

STATEMENT REGARDING THE PARTIES AND PETITIONER'S CORPORATE AFFILIATES

The caption of this case contains the names of all the parties to the appeal before the Supreme Court of the State of Hawaii.1/ Although the Hawaii Life and Disability Insurance Guaranty Association ("Hawaii Guarantee Association") was not named as a party in the state court action, it exercised its statutory authority and participated in the proceedings before both the circuit court and Hawaii Supreme Court. *See* HAW. REV. STAT. § 431:16–208(l) (1987).2/

Pursuant to Supreme Court Rule 29.6, Petitioner Investors Equity Life Holding Company states that it has no parent company or nonwholly owned subsidiaries.3/

1/ Lawrence M. Reifurth ("Reifurth") served as the Insurance Commissioner of the State of Hawaii when the subject rehabilitation and liquidation proceedings were commenced in the state circuit court. The rehabilitation and liquidation petitions were brought in Reifurth's name, in his capacity as Insurance Commissioner, in accordance with HAW. REV. STAT. §§ 431:15–301 and 431:15–305 (1987). Reifurth's successor in office, Wayne C. Metcalf, automatically was substituted as the petitioner in the state proceedings, *see* Haw. R. App. P. 43(c)(1), and is named as a Respondent in the case before this Court.

2/ The Hawaii Guarantee Association is a nonprofit legal entity created by the Hawaii Insurance Code. HAW. REV. STAT. § 431:16–206 (1987).

3/ Respondent Investors Equity Life Insurance Company of Hawaii, Ltd. is a wholly owned subsidiary of Petitioner Investors Equity Life Holding Company.

TABLE OF CONTENTS

Page

QUESTION PRESENTED ii

STATEMENT REGARDING THE PARTIES AND PETITIONER'S CORPORATE AFFILIATES iii

TABLE OF CONTENTS iv

APPENDICES vi

TABLE OF AUTHORITIES viii

OPINIONS BELOW 1

JURISDICTION 2

APPLICABLE CONSTITUTIONAL PROVISION AND STATE STATUTES 2

STATEMENT OF THE CASE 3

A. Insurance Commissioner's Petition for Seizure and Rehabilitation of IEL 5

B. Insurance Commissioner's Petition for Liquidation and IELHC's

Petition for Approval of Its Own Rehabilitation Plan 6

C. Consolidated Hearings on Petitions 8

D. The Circuit Court's Findings of Fact, Conclusions of Law, and Order 11

E. IELHC's Appeal to the Hawaii Supreme Court 14

REASON FOR GRANTING THE WRIT 17

IELHC's Constitutional Right to Due Process Provides the Holding Company with Standing to Oppose the Commissioner's Liquidation Petition 17

A. Standing 17

B. The Hawaii Supreme Court's Resolution of the Standing Question Under the Rehabilitation and Liquidation Act 19

C. IELHC's Due Process Right as a Basis for Standing to Oppose the Commissioner's Liquidation Petition 21

CONCLUSION 26

APPENDICES

Appendix A:

Hawaii Supreme Court's Opinion A–1

Appendix B:

Hawaii Supreme Court's Notice and Judgment on Appeal B–1

Appendix C:

Circuit Court's Findings of Fact, Conclusions of Law, and Order C–1

Appendix D:

Circuit Court's Judgment D–1

Appendix E:

Circuit Court's Seizure Order E–1

Appendix F:

Circuit Court's Order to Show Cause F–1

Appendix G:

Circuit Court's Stipulated Rehabilitation Order G–1

Appendix H:

Stipulation to Allow Intervention of Investors Equity Life Holding Company and Order H–1

Appendix I:

Circuit Court's Disposition of Motion/Matter Taken Under Advisement I–1

Appendix J:

Relevant Provisions of Hawaii's Rehabilitation and Liquidation Act J–1

Appendix K:

Other Relevant Provisions of the Hawaii Insurance Code K–1

TABLE OF AUTHORITIES

Page

CASES

Archuleta v. Colorado Dep't of Insts.,
936 F.2d 483 (10th Cir. 1991).....22

Ariyoshi v. Hawaii Pub. Employment Relations Bd.,
704 P.2d 917 (Haw. Ct. App. 1985).....25, 26

Baker v. McCollan, 443 U.S. 137 (1979).....21, 24

Battaglia v. General Motors Corp., 169 F.2d 254 (2d Cir.),
cert. denied, 335 U.S. 887 (1948).....25

Board of Governors of the Fed. Reserve Sys. v. D.L.G. Fin. Corp., 29 F.3d 993 (5th Cir. 1994), *cert. dismissed*,
115 S. Ct. 1085 (1995).....24

Board of Regents v. Roth, 408 U.S. 564 (1972).....22, 23

Borreca v. Fasi, 369 F. Supp. 906 (D. Haw. 1974).....21

Cleveland Bd. of Educ. v. Loudermill,
470 U.S. 532 (1985).....22

Farthing v. City of Shawnee, Kan.,
39 F.3d 1131 (10th Cir. 1994).....21, 22, 23

Harris v. Blake, 798 F.2d 419 (10th Cir. 1986),
cert. denied, 479 U.S. 1033 (1987).....22

Hartnett v. Southern Am. Fire Ins. Co.,
495 So. 2d 902 (Fla. Dist. Ct. App. 1986).....20

Hawaii's Thousand Friends v. Anderson,
768 P.2d 1293 (Haw. 1989) 18, 19

International Primate Protection League v. Administrators of Tulane Educ. Fund, 500 U.S. 72 (1991) 18, 21

Life of the Land v. Land Use Comm'n,
623 P.2d 431 (Haw. 1981) 17, 18, 19, 25, 26

Mathews v. Eldridge, 424 U.S. 319 (1976) 22

Metcalf v. Investors Equity Life Ins. Co. of Hawaii, Ltd.,
910 P.2d 110 (Haw. 1996) 1, 20

Metropolitan Life Ins. Co. v. Ward,
470 U.S. 869 (1985) 21

Moore v. City of E. Cleveland, Ohio,
431 U.S. 494 (1977) 22

Morrissey v. Brewer, 408 U.S. 471 (1972) 22

Paul v. Davis, 424 U.S. 693 (1976) 23

Pele Defense Fund v. Puna Geothermal Venture,
881 P.2d 1210 (Haw. 1994) 18

Reliable Collection Agency, Ltd. v. Cole,
584 P.2d 107 (Haw. 1978) 18

Sierra Club v. Morton, 405 U.S. 727 (1972) 19

Warth v. Seldin, 422 U.S. 490 (1975) 18, 19

CONSTITUTIONAL PROVISION

U.S. CONST. amend. XIV, § 1 ..... 2–3, 21, 24

STATUTES

28 U.S.C. § 1257(a) 2

28 U.S.C. § 2403(a)–(b) 2

HAW. REV. STAT. § 431:11–102 24

HAW. REV. STAT. § 431:15–101(c)–(d) 20

HAW. REV. STAT. § 431:15–202 5

HAW. REV. STAT. § 431:15–301 ..... iii, 5, 7

HAW. REV. STAT. § 431:15–302 6

HAW. REV. STAT. § 431:15–305 ..... iii, 13

HAW. REV. STAT. § 431:15–306 7

HAW. REV. STAT. § 431:15–307 24

HAW. REV. STAT. § 431:15–332 24

HAW. REV. STAT. § 431:16–206 iii

HAW. REV. STAT. § 431:16–208(l) iii

RULES

Sup. Ct. R. 13 2

Sup. Ct. R. 14.1(e)(v) 2

Sup. Ct. R. 29.4(b)–(c) 2

Sup. Ct. R. 29.6 iii

Haw. R. App. P. 43(c)(1) iii

SECONDARY AUTHORITY

Kenneth C. Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450, 473 (1970) 25

PETITION FOR A WRIT OF CERTIORARI

Petitioner Investors Equity Life Holding Company ("IELHC") respectfully requests that this Court exercise its jurisdiction to review the judgment entered in this case by the Supreme Court of the State of Hawaii. The Hawaii Supreme Court dismissed, for lack of standing, IELHC's appeal from a Hawaii circuit court's judgment and order granting the Respondent Insurance Commissioner's petition to liquidate IELHC's wholly owned subsidiary, Investors Equity Life Insurance Company of Hawaii, Ltd. ("IEL"), pursuant to Hawaii's Insurers Supervision, Rehabilitation and Liquidation Act, HAW. REV. STAT. §§ 431:15–101 to 431:15–411 (1987) ("Rehabilitation and Liquidation Act").

OPINIONS BELOW

The opinion by the Supreme Court of the State of Hawaii dismissing IELHC's appeal for lack of standing is reported as *Metcalf v. Investors Equity Life Insurance Co. of Hawaii, Ltd.*, 910 P.2d 110 (Haw. 1996), and is reproduced as Petitioner's Appendix A. The Hawaii Supreme Court's Notice and Judgment on Appeal, which was entered in accordance with the aforementioned opinion, is reproduced as Petitioner's Appendix B.

The circuit court's Findings of Fact, Conclusions of Law, and Order granting the Insurance Commissioner's petition to liquidate IEL is reproduced as Petitioner's Appendix C. The circuit court's Judgment thereon, from which IELHC appealed to the Hawaii Supreme Court, is reproduced as Petitioner's Appendix D.

The following orders of the circuit court also are relevant to this Petition and accordingly are included as

appendices hereto: (1) Seizure Order, filed June 22, 1994, (Pet'r's App. E); (2) Order to Show Cause, filed June 22, 1994, (Pet'r's App. F); (3) Stipulated Rehabilitation Order, filed June 24, 1994, (Pet'r's App. G); (4) Stipulation to Allow Intervention of Investors Equity Life Holding Company and Order, filed August 10, 1994, (Pet'r's App. H); and (5) Disposition of Motion/Matter Taken Under Advisement, filed September 22, 1994, (Pet'r's App. I).

JURISDICTION

The Supreme Court of the State of Hawaii issued its opinion dismissing IELHC's appeal on January 11, 1996, and subsequently entered its Notice and Judgment on Appeal on January 24, 1996. This Petition is timely filed under Supreme Court Rule 13.

IELHC invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(a) (1993). Pursuant to Supreme Court Rules 14.1(e)(v) and 29.4(b)–(c), IELHC states that neither 28 U.S.C. § 2403(a) (1993) nor 28 U.S.C. § 2403(b) (1993) applies to this Petition.

APPLICABLE CONSTITUTIONAL PROVISION AND STATE STATUTES

The constitutional provision involved in this case is Section 1 of the Fourteenth Amendment to the United States Constitution, which states in part as follows:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of

> law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

Relevant provisions of the Hawaii Rehabilitation and Liquidation Act are reproduced in Petitioner's Appendix J. Other provisions of the Hawaii Insurance Code cited in this Petition are reproduced in Petitioner's Appendix K.

- STATEMENT OF THE CASE

This case arises out of the Respondent Insurance Commissioner's seizure and subsequent liquidation of IEL, an insurance company incorporated and licensed under the laws of the State of Hawaii since 1963. Petitioner IELHC purchased all of the authorized, issued, and outstanding shares of IEL's stock in 1991, in accordance with the terms of a Confidential Regulatory Agreement between the Insurance Commissioner and IELHC. As a result, IELHC is the parent company and sole shareholder of IEL.

When IEL became insolvent in 1994, the Insurance Commissioner commenced delinquency proceedings and obtained an order allowing for the seizure of IEL's property, books, accounts, documents, and other records. The Insurance Commissioner initially planned to rehabilitate IEL, and IELHC supported that effort by entering into a Stipulated Rehabilitation Order with the Insurance Commissioner. Shortly thereafter, however, the Insurance Commissioner abandoned the rehabilitation alternative and instead filed a petition to liquidate IEL.

Upon the unqualified stipulation of the Insurance Commissioner, which was made an order of the Hawaii circuit court, IELHC intervened in the case as a party respondent. The circuit court imposed no limitations on

IELHC's participation in the proceedings. As a party to the action, IELHC petitioned the circuit court for approval of its own plan to rehabilitate IEL and simultaneously opposed the Insurance Commissioner's petition for liquidation. The court held a series of hearings on the parties' respective petitions, but never conducted a full evidentiary hearing concerning the appropriateness of the requested relief. The court ultimately denied IELHC's petition for approval of its rehabilitation plan and, over IELHC's objections, granted the Insurance Commissioner's petition for liquidation.

IELHC appealed the matter to the Supreme Court of the State of Hawaii, raising two primary points of error: (1) the lower court's findings of fact and conclusions of law were based on insufficient evidence in the record; and (2) the lower court denied IELHC its constitutional right to due process by failing to conduct a full evidentiary hearing on the Insurance Commissioner's petition to liquidate IEL. The Hawaii Supreme Court dismissed IELHC's appeal for lack of standing to oppose the Insurance Commissioner's liquidation petition, without reaching the merits of IELHC's substantive arguments. In reaching the conclusion that IELHC lacked standing to oppose the liquidation petition, the Hawaii Supreme Court looked solely to the language of the Hawaii Rehabilitation and Liquidation Act. The Hawaii Supreme Court failed to address IELHC's assertion of standing based on its constitutional right to due process.

The question presented to this Court is whether the Hawaii Supreme Court erred in holding that IELHC had no standing to oppose the Insurance Commissioner's petition to liquidate IEL, IELHC's wholly owned subsidiary, despite IELHC's assertion that the involuntary liquidation of the insurer would violate IELHC's right under the United States

Constitution not to be deprived of its property without due process of law.

A. Insurance Commissioner's Petition for Seizure and Rehabilitation of IEL

On June 22, 1994, the Insurance Commissioner filed a Petition for an *Ex Parte* Seizure Order Pursuant to [HAW. REV. STAT.] § 431:15–202 and for Rehabilitation of a Domestic Insurer Pursuant to [HAW. REV. STAT.] § 431:15–301 ("Petition for Seizure and Rehabilitation") in the Hawaii circuit court. The Petition for Seizure and Rehabilitation was supported by the affidavits of the Insurance Commissioner, Lawrence M. Reifurth, and the Chief Examiner of the Hawaii Division of Insurance ("Insurance Division"), Timothy P. Bogan. As grounds for the Petition for Seizure and Rehabilitation, Reifurth and Bogan attested, *inter alia*, that IEL was insolvent and in such condition that the further transaction of business by the company would be financially hazardous to its policyholders, creditors, and the public. *See* HAW. REV. STAT. § 431:15–301(a)(1)–(2). In accordance with the rehabilitation statute, however, Reifurth also stated that he reasonably believed IEL could be successfully rehabilitated without substantial increase in the risk of loss to those same persons. *See* HAW. REV. STAT. § 431:15–301(a).

The circuit court immediately entered two orders in relation to the Petition for Seizure and Rehabilitation. The circuit court issued a Seizure Order authorizing the Insurance Commissioner to take possession and control of IEL's property, books, accounts, documents, and other records, pursuant to HAW. REV. STAT. § 431:15–202, upon finding that grounds existed for formal delinquency proceedings and that any delay would endanger the rights of the

policyholders, creditors, and the public. (Pet'r's App. E.) The circuit court also issued to IEL an Order to Show Cause why the court should not enter a rehabilitation order upon the grounds asserted in the Insurance Commissioner's petition. (Pet'r's App. F.)

IEL and IELHC supported the Insurance Commissioner's decision to rehabilitate the company and, as a result of the parties' combined effort, the circuit court entered a Stipulated Rehabilitation Order only two days after the issuance of its Seizure Order and Order to Show Cause. (Pet'r's App. G.) Pursuant to the Stipulated Rehabilitation Order, and in accordance with the applicable provisions of the Rehabilitation and Liquidation Act, the circuit court authorized and directed the Insurance Commissioner and his successors in office to take possession of IEL's assets and administer the same under the general supervision of the court. (*See id.*) *See* HAW. REV. STAT. § 431:15–302(a). The presidents of both IEL and IELHC approved and signed the Stipulated Rehabilitation Order.

B. Insurance Commissioner's Petition for Liquidation and IELHC's Petition for Approval of Its Own Rehabilitation Plan

On August 5, 1994, just weeks after the circuit court entered the Stipulated Rehabilitation Order in accordance with the parties' agreement, the Insurance Commissioner abandoned his decision to rehabilitate IEL. The Insurance Commissioner instead filed a Petition for Liquidation of Investors Equity Life Insurance Company of Hawaii, Ltd. ("Petition for Liquidation"). The Petition for Liquidation, like the earlier Petition for Seizure and Rehabilitation, was supported by the affidavits of Insurance Commissioner Reifurth and Chief Examiner Bogan. Reifurth and Bogan

attested that it was appropriate to now liquidate IEL under the governing statutes because, *inter alia*: (a) the Insurance Division had examined the available financial statements of IEL; (b) based on that examination, IEL was insolvent; (c) the further transaction of business by IEL would be hazardous to its policyholders, creditors, and the public; and (d) any attempt to rehabilitate IEL would be futile and serve no useful purpose. *See* HAW. REV. STAT. §§ 431:15–301, –306.

IELHC, in order to protect its interest in IEL, sought to intervene in the proceedings before the circuit court. The Insurance Commissioner had no objection and, on August 10, 1994, stipulated to IELHC's intervention in the case. (*See* Pet'r's App. H.) As an intervenor in the action, IELHC immediately filed its Petition for Approval of Intervenor's Plan of Rehabilitation of Investors Equity Life Insurance Company of Hawaii, Ltd. ("IELHC's Petition for Approval of Rehabilitation Plan"). IELHC's rehabilitation plan contemplated the infusion of significant real estate holdings and other assets into IEL, such that the financial deficiencies identified by the Insurance Commissioner would be eliminated.

IELHC also filed its answer to the Insurance Commissioner's petition to liquidate IEL. IELHC's answer stated, *inter alia*, that an order granting the Insurance Commissioner's liquidation petition, without affording IELHC an opportunity to present evidence in opposition to the petition at a full evidentiary hearing, would violate its due process and other rights under the United States and Hawaii Constitutions.

C. Consolidated Hearings on Petitions

The circuit court set both the Insurance Commissioner's Petition for Liquidation and IELHC's Petition for Approval of Rehabilitation Plan for hearing on August 15, 1994. Counsel for the Insurance Commissioner and IELHC argued the merits of the liquidation and rehabilitation petitions, but neither side presented any witness testimony or other evidence at the hearing. Observing that the parties' respective positions were directly at odds, and noting the various, significant interests at stake, the court instructed counsel to explore the possibility of a compromise before it entered a ruling on either petition. The circuit court therefore took the matter under submission and continued the hearing until the next day.

On August 16, 1994, the parties entered into a stipulation which, in effect, maintained the status quo while the Insurance Commissioner reviewed IELHC's rehabilitation plan. As a practical matter, although the Insurance Commissioner maintained that he had the sole discretion to prepare and present a plan to rehabilitate IEL, he agreed to seriously study IELHC's rehabilitation plan before pursuing an involuntary liquidation. As a result, the circuit court again continued the hearing on the petitions for rehabilitation and liquidation, this time until September 2, 1994.

When the circuit court reconvened the consolidated hearing on the petitions for rehabilitation and liquidation on September 2, 1994, counsel for the Insurance Commissioner informed the court that, in the Insurance Commissioner's opinion, IELHC's proposed rehabilitation plan was not a viable method of curing IEL's insolvency. In the Insurance Commissioner's view, the only solution was to liquidate

IEL. Once again, however, the Insurance Commissioner provided no testimony or other evidence in support of his liquidation petition, other than the previously submitted affidavits. IELHC specifically objected to the proceedings on due process and evidentiary grounds.

Similarly, at another continuation of the consolidated hearing, on September 6, 1994, IELHC again requested a full evidentiary hearing on the merits of the liquidation and rehabilitation petitions. IELHC also requested that the court approve a procedure whereby the holding company could present a plan of rehabilitation and receive a formal response from the Insurance Commissioner. The Insurance Commissioner, for his part, generally opposed each of IELHC's requests. The circuit court, recognizing the complexity of the matter and the divergence of the parties' respective positions, thus ordered the parties to brief the following issues: (1) whether the court was required to conduct an evidentiary hearing on the liquidation and rehabilitation petitions; (2) the showings required in relation to the respective petitions; and (3) which parties had standing to participate in those proceedings. The court further continued the consolidated hearing in order to consider the parties' submissions.

IELHC tendered a supplemental memorandum, in accordance with the circuit court's instructions, on September 13, 1994. IELHC squarely addressed the standing issue identified by the circuit court, and presented for review to this Court, as follows:

> As the sole shareholder of [IEL], [IELHC] has a significant property right that warrants protection and that guarantee[s] the Holding Company a due process right to be

> heard. A substantial interference with a stockholder's property rights constitutes a deprivation of property without due process (and without just compensation).
>
> Because the Commissioner's action will substantially affect the Holding Company's shareholder interest in [IEL], fundamental due process of law confers standing upon the Holding Company to contest liquidation and advocate rehabilitation.
>
> . . . .
>
> . . . It is both unconstitutional and disingenuous of the Commissioner to deny the Holding Company or other parties standing under these circumstances. It is especially bizarre when the Commissioner seeks to exclude the Holding Company from even participating, by advocating a plan of rehabilitation, but then to turn around and argue that the Holding Company has failed to present sufficient evidence to support its plan of rehabilitation.

(Intervenor [IELHC's] Supplemental Mem. Re: Constitutional and Statutory Requirements for Hr'g on Rehabilitation or Liquidation of Resp't [IEL] at 38–40 [filed Sept. 13, 1994] [citations and footnotes omitted].)

On September 19, 1994, the circuit court reconvened the consolidated hearing on the two petitions. Without hearing any testimony or taking other evidence, the court denied IELHC's Petition for Approval of Rehabilitation Plan. The court took the Insurance Commissioner's Petition

for Liquidation under advisement, indicating that it would soon inform the parties of its ruling.

Shortly thereafter, on September 22, 1994, the circuit court issued a minute order granting the Insurance Commissioner's liquidation petition and requiring the parties to submit proposed findings of fact and conclusions of law, or objections to the issuance of the same, as appropriate. (*See* Pet'r's App. I.) The Insurance Commissioner submitted his proposed Findings of Fact, Conclusions of Law, and Order on November 14, 1994. IELHC submitted its objections thereto on December 5, 1994. The circuit court ultimately rejected IELHC's objections and, on December 29, 1994, entered its Findings of Fact, Conclusions of Law, and Order in the form submitted by the Insurance Commissioner.

D. The Circuit Court's Findings of Fact, Conclusions of Law, and Order

The circuit court's findings of fact related both to the grounds for liquidating IEL and the merits of IELHC's rehabilitation plan. In particular, in relation to the Insurance Commissioner's liquidation petition, the court found: (1) IEL was insolvent; (2) IEL failed to timely file certain financial reports; (3) any delay in the delinquency proceedings would cause harm to IEL's policyholders and creditors; and (4) any attempt to rehabilitate IEL would be futile or serve no useful purpose. (*See* Pet'r's App. C at C–6, ¶¶ 11–13.) With respect to IELHC's rehabilitation plan, the circuit court found that the present value of the income associated with the assets to be infused in IEL would not cure the insolvency. (*See id.* at C–9, ¶¶ 23–24.) The court also found, over IELHC's specific objection, that the record failed to establish that IELHC's rehabilitation plan would

"eliminate completely the alleged insolvency of [IEL], cause all existing policyholders to be fully paid, and make sufficient funds available to satisfy all claims of creditors, . . . and restore [IEL] to a viable going concern." (*See id.* at C–9 through C–10, ¶ 25.)[4/]

Notwithstanding the entry of the foregoing findings of fact, which went directly to the merits of the parties' respective submissions, the circuit court proceeded to address the question of IELHC's standing to participate in the proceedings in the first instance. The following conclusions of law are particularly relevant to the standing issue:

> 2. [The Rehabilitation and Liquidation Act] does not recognize the right of a shareholder of an insurance company or any person other than the Insurance Commissioner to seek approval of a plan of rehabilitation of an insurance company.
>
> . . . .
>
> 6. With regard to the power to submit a plan of rehabilitation of an insurer, [the Rehabilitation and Liquidation Act]

4/ IELHC specifically objected to this finding on the ground that, "[t]he Court held no evidentiary hearing on the IELHC Rehabilitation Plan, having decided that IELHC had no standing to propose it. Thus, this Finding is improper, as there was no opportunity to develop a factual record relating to the Rehabilitation Plan." (Intervenor [IELHC's] Objections to Proposed Findings of Fact, Conclusions of Law and Order at 3, ¶ 25 [filed Dec. 5, 1994] [hereinafter IELHC's Objections].)

> specifically limits that power to the Insurance Commissioner. . . .
>
> 10. Pursuant to [HAW. REV. STAT.] § 431:15--305, the "court shall permit the directors of the insurer to take such actions as are reasonably necessary to defend against the [liquidation] petition . . . ." Thus, while the directors of IEL are permitted to object to a petition for liquidation, there is no authority for shareholders, policyholders, or creditors to intervene in the proceeding to challenge the discretionary authority of the Insurance Commissioner to implement a plan of liquidation. . . .
>
> . . . .
>
> 12. This Court concludes that, consistent with the foregoing, IELHC has no standing to submit a plan of rehabilitation to this Court. Notwithstanding this conclusion, IELHC has been afforded a full opportunity to present its position in this proceeding and its submissions have been considered, without regard to its lack of standing.

(Pet'r's App. C at C–10 through C–16, ¶¶ 2, 6, 10, 12.)[5/] By and through its findings and conclusions, therefore, the circuit court held that IELHC, IEL's parent company and sole shareholder, had no standing to present a rehabilitation

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5/ IELHC specifically objected to the conclusions of law set forth in paragraphs 6, 10, and 12. (IELHC's Objections at 4, ¶¶ 6, 10, 12.)

plan designed to cure the insurer's insolvency and contemporaneously oppose the Insurance Commissioner's liquidation petition. Accordingly, the circuit court declared IEL insolvent, denied IELHC's Petition for Approval of Rehabilitation Plan, and reaffirmed its decision to grant the Insurance Commissioner's Petition for Liquidation. IEL is now in the process of being liquidated.

E. IELHC's Appeal to the Hawaii Supreme Court

IELHC appealed the circuit court's judgment directly to the Supreme Court of the State of Hawaii. The holding company asserted two points of error on appeal: (1) there was insufficient evidence in the record to support the circuit court's Findings of Fact, Conclusions of Law, and Order denying IELHC's Petition for Approval of Rehabilitation Plan and granting the Insurance Commissioner's Petition for Liquidation; and (2) the circuit court deprived IELHC of its due process rights under the United States and Hawaii Constitutions by failing to conduct a full evidentiary hearing prior to ordering the liquidation of IEL, its wholly owned subsidiary.

In its opening brief, IELHC specifically restated the constitutional basis for its standing to challenge the Insurance Commissioner's liquidation petition:

> [IELHC] is the parent and sole shareholder of IEL and therefore has a definite, clear, and undeniable property interest in IEL. [IELHC] also has a vital . . . property interest in the monies and assets of IEL. Therefore, [IELHC] is entitled to the full constitutional guarantees of an opportunity for notice and opportunity to participate in a meaningful

> manner prior to being deprived of its property by the State.

(Opening Br. of Intervenor/Resp't–Appellant at 20 [filed May 17, 1995].) Similarly, IELHC argued that it had standing to challenge the Insurance Commissioner's action as follows:

> [D]ue process requires that [the creditors, policyholders, shareholders, members and all other persons interested in IEL's assets] must have notice and a full and fair opportunity to be heard. Clearly, such persons include [IELHC], whose interests are vitally affected by having the property in the form of its wholly owned subsidiary confiscated through liquidation without a full trial. But the breadth of standing under the Due Process Clause is as great as the interests to be affected . . . . Therefore, all of those who have such an interest have a right to be heard.
>
> . . . .
>
> The Commissioner's action substantially affects [IELHC's] shareholder interest in IEL. Fundamental due process of law confers standing upon [IELHC] to contest liquidation and advocate rehabilitation.

(*Id.* at 33–34 [footnote omitted].)

The Insurance Commissioner and the Hawaii Guarantee Association each argued, in their respective answer briefs, that the circuit court's decision should be

affirmed in all respects. Their argument, as a general matter, was twofold: (1) IELHC lacked standing to submit a rehabilitation plan or oppose the liquidation petition in the first instance; and (2) even if IELHC had standing, the holding company's substantive arguments were without merit. (*See* Answer Br. of Intervenor-Appellee [Hawaii Guarantee Ass'n] at 13–31 [filed June 28, 1995] [hereinafter Hawaii Guarantee Ass'n's Answer Br.]; Answer Br. of Pet'r-Appellee Wayne C. Metcalf, Insurance Commissioner of the State of Hawaii at 24–35 [filed June 28, 1995] [hereinafter Insurance Comm'r's Answer Br.].) The standing challenge, however, was limited in scope. The Hawaii Guarantee Association relied almost exclusively on the language of the State's Rehabilitation and Liquidation Act, giving only cursory attention to IELHC's assertion of a constitutional basis for standing. (Hawaii Guarantee Ass'n's Answer Br. at 17–18.) The Insurance Commissioner, for his part, ignored IELHC's constitutional argument altogether, and further argued that the stipulation allowing IELHC's intervention had no bearing on the question of standing. (Insurance Comm'r's Answer Br. at 28.)

On January 11, 1996, the Hawaii Supreme Court issued its *per curiam* opinion on IELHC's appeal from the circuit court's judgment. The supreme court recognized IELHC's substantive arguments concerning insufficiency of the evidence and lack of due process but, in the same breath, stated that it was unnecessary to reach the merits of either contention. According to the supreme court, IELHC lacked standing to oppose the liquidation petition, notwithstanding the circuit court's August 10, 1994 order approving the Insurance Commissioner's stipulation to allow IELHC to intervene in the delinquency proceedings. In reaching its conclusion, however, the Hawaii Supreme Court looked

solely to the language of the State's Rehabilitation and Liquidation Act and, like the circuit court, determined that the statutory scheme did not permit a shareholder to challenge the Insurance Commissioner's liquidation petition. The Hawaii Supreme Court's six-page opinion makes no reference to IELHC's argument that it had standing to oppose the liquidation petition by virtue of its constitutional right not to be deprived of property without due process of law.

On January 24, 1996, the Hawaii Supreme Court entered judgment in accordance with its written opinion dismissing IELHC's appeal for lack of standing. This Petition for a Writ of Certiorari followed.

REASON FOR GRANTING THE WRIT

IELHC's Constitutional Right to Due Process Provides the Holding Company with Standing to Oppose the Commissioner's Liquidation Petition

A. Standing

The narrow issue presented to this Court for review is whether the Hawaii Supreme Court erred in holding that IELHC lacked standing to oppose the Insurance Commissioner's petition to liquidate IEL. Although the standing inquiry in the federal courts stems from the "case or controversy" requirement imposed by Article III of the United States Constitution, the jurisdiction of the Hawaii state courts is not subject to a constitutional limitation. *Life of the Land v. Land Use Comm'n*, 623 P.2d 431, 438 (Haw. 1981). The Hawaii Supreme Court has determined, nevertheless, that "judicial power to resolve public disputes in a system of government where there is a separation of powers should be limited to those questions capable of

judicial resolution and presented in an adversary context." *Id.* (citing *Reliable Collection Agency, Ltd. v. Cole*, 584 P.2d 107, 111 (Haw. 1978)). Even in the absence of constitutional restrictions, moreover, "courts still carefully weigh the wisdom, efficacy, and timeliness of an exercise of their power before acting . . . ." *Id.; see Warth v. Seldin*, 422 U.S. 490, 498 (1975) (This "prudential limitation" on the exercise of a court's jurisdiction, like the Article III "constitutional limitation," "is founded in concern about the proper—and properly limited—role of the courts in a democratic society.") (citations omitted). In short, even in the Hawaii state courts, "judicial intervention in a dispute is normally contingent upon the presence of a 'justiciable' controversy." *Life of the Land*, 623 P.2d at 438 (citations omitted).

"Standing is that aspect of justiciability focusing on the party seeking a forum rather than on the issues he wants adjudicated." *Id.; see Hawaii's Thousand Friends v. Anderson*, 768 P.2d 1293, 1298 (Haw. 1989) (quoting *Life of the Land*, 623 P.2d at 438, with approval); *see also Pele Defense Fund v. Puna Geothermal Venture*, 881 P.2d 1210, 1213 (Haw. 1994) ("Standing is concerned with whether the parties have the right to bring suit.") (citation omitted). There is little question that a statute can confer standing on a party to challenge an action alleged to be wrongful. *See International Primate Protection League v. Administrators of Tulane Educ. Fund*, 500 U.S. 72, 77 (1991) ("[S]tanding is gauged by the specific common-law, statutory or constitutional claims that a party presents."). "Where the party does not rely on any specific statute authorizing invocation of the judicial process, [however], the question of standing depends upon whether the party has alleged such a 'personal stake in the outcome of the controversy' as to ensure that 'the dispute sought to be adjudicated will be

presented in an adversary context and in a form historically viewed as capable of judicial resolution.'" *Sierra Club v. Morton*, 405 U.S. 727, 732 (1972) (citations omitted); *see Life of the Land*, 623 P.2d at 438 (The critical inquiry in the standing determination is "whether the [complaining party] has 'alleged such a personal stake in the outcome of the controversy' as to warrant [its] invocation of [the court's] jurisdiction and to justify exercise of the court's remedial powers on [its] behalf.") (quoting *Warth*, 422 U.S. at 498–99); *see also Hawaii's Thousand Friends*, 768 P.2d at 1298.

IELHC asserted that it had standing to oppose the Insurance Commissioner's liquidation petition on each of those grounds: (1) the Rehabilitation and Liquidation Act provided a statutory basis for IELHC's challenge; and (2) alternatively, the potential violation of IELHC's constitutional right to due process gave it a "personal stake in the outcome of the controversy," such that IELHC had standing regardless of what the statute provided. As discussed below, however, the Hawaii Supreme Court only addressed the former issue—whether the Rehabilitation and Liquidation Act conferred IELHC with standing. The court failed to address IELHC's assertion of standing on constitutional grounds.

B. The Hawaii Supreme Court's Resolution of the Standing Question Under the Rehabilitation and Liquidation Act

The Hawaii Supreme Court framed the dispositive issue in this case as "whether IELHC had standing to appear before the circuit court, notwithstanding the court's August 10, 1994 order approving the parties' stipulation to allow IELHC to intervene in the delinquency proceedings for the

purpose of proposing a rehabilitation plan." *Metcalf v. Investors Equity Life Ins. Co. of Haw., Ltd.*, 910 P.2d 110, 111 (Haw. 1996) [attached hereto as Pet'r's App. A]. In answering that question, the supreme court looked solely to the Rehabilitation and Liquidation Act and determined that "Article 15 [of the Act] does not recognize the interests of shareholders, like IELHC, of an insolvent insurance company." *Id.* (citing *Hartnett v. Southern Am. Fire Ins. Co.*, 495 So. 2d 902, 903 (Fla. Dist. Ct. App. 1986)). According to the Hawaii Supreme Court:

> Like the Florida statute construed in *Hartnett*, . . . the purpose of Article 15 is for "the protection of the interests of *insureds, claimants, creditors*, and the *public* generally with minimum interference with the normal prerogatives of the owners and managers of insurers." [HAW. REV. STAT.] § 431:15–101(d). "Absent from the purpose of the act is the protection of the *shareholders* of the insolvent insurance company. Section 431:15–101(c) provides that the act 'shall be liberally construed to effect the purpose stated in subsection (d).'" *Hartnett*, 495 So. 2d at 903 (emphasis in original). Therefore, we hold that IELHC did not have standing to oppose the petition to liquidate IEL in the instant case.

Id. (footnote omitted). With those observations, the Hawaii Supreme Court dismissed IELHC's appeal for lack of standing to oppose the Insurance Commissioner's liquidation petition. *Id.*

Although the Hawaii Supreme Court looked to the asserted statutory basis for IELHC's standing to challenge the liquidation petition—the Rehabilitation and Liquidation Act—it went no further. The court ignored IELHC's argument that it also had standing to oppose the Insurance Commissioner's petition to liquidate IEL, the holding company's wholly owned subsidiary, by virtue of IELHC's right under the United States Constitution not to be deprived of its property without due process of law. *See International Primate Protection League*, 500 U.S. at 77. Notwithstanding the Hawaii Supreme Court's construction of the applicable statute, the potential violation of IELHC's due process right provides the holding company with a "personal stake in the outcome of the controversy" such that IELHC had standing to oppose the liquidation petition.

C. IELHC's Due Process Right as a Basis for Standing to Oppose the Commissioner's Liquidation Petition

The Due Process Clause of the Fourteenth Amendment does not protect against all deprivations of a person's[6/] "life, liberty, or property" by a state government; it only protects against a governmental deprivation of a person's interest "without due process of law." U.S. CONST. amend. XIV, § 1; *see Baker v. McCollan*, 443 U.S. 137, 145 (1979); *Farthing v. City of Shawnee, Kan.*, 39 F.3d 1131, 1135 (10th Cir. 1994). In determining whether a state

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6/ A corporation is a "person" entitled to protection under the Fourteenth Amendment. *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 881 n.9 (1985); *Borreca v. Fasi*, 369 F. Supp. 906, 911 (D. Haw. 1974).

government has deprived an individual of its right to procedural due process,[7] the courts typically engage in a two-step inquiry: (1) whether the individual possesses a protected interest, such that the due process safeguards attach; and (2) if so, whether the individual was afforded the necessary due process protection under the circumstances. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985) ("In short, once it is determined that the Due Process Clause applies, 'the question remains what process is due.'") (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)); *Farthing*, 39 F.3d at 1135. As discussed below, the resolution of the first question requires reference to state law. *See Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). The determination of the second question generally involves the application of the balancing test adopted in *Mathews v. Eldridge*, 424 U.S. 319 (1976), which focuses on the nature of the governmental and private interests at stake. *See id.* at 334 ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands.") (quoting *Morrissey*, 408 U.S. at 481).

7/ "The Due Process Clause not only provides a procedural safeguard against deprivations of life, liberty, and property but also protects substantive aspects of those interests from unconstitutional restrictions by government." *Harris v. Blake*, 798 F.2d 419, 424 (10th Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987); *see Archuleta v. Colorado Dep't of Insts.*, 936 F.2d 483, 489 (10th Cir. 1991) ("Although the phrase 'due process' connotes a right to a fair hearing, the Supreme Court has recognized that the [Due Process Clause] contains a substantive component as well.") (citing *Moore v. City of E. Cleveland, Ohio*, 431 U.S. 494 (1977)). The issue presented for review to this Court relates to the procedural component of due process protection.

Only the first prong of the due process inquiry is relevant to the standing issue presented for review in this case. Specifically, if IELHC has a protected property interest in IEL, it is entitled to some degree of due process before the Insurance Commissioner or any other state governmental authority can deprive it of that interest, by liquidation or otherwise. The very existence of IELHC's constitutional right to due process provides the holding company with standing to oppose the Insurance Commissioner's liquidation petition. The second prong of the due process analysis—the amount of due process required under the circumstances—is only relevant to the merits of IELHC's underlying assertion of error concerning the circuit court's failure to conduct a full evidentiary hearing on the liquidation petition. As a result, the question here focuses on whether IELHC has a property interest protected by the Fourteenth Amendment.

The Constitution does not create or define the contours of "property" or, for that matter, "liberty," which are "the 'broad and majestic terms' enshrined in the Fourteenth Amendment." *Farthing*, 39 F.3d at 1135 (citing *Roth*, 408 U.S. at 571). Property interests, rather, "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Id.* (quoting *Roth*, 408 U.S. at 571); *see Paul v. Davis*, 424 U.S. 693, 710 (1976) ("[Liberty and property] interests attain . . . constitutional status by virtue of the fact that they have been initially recognized and protected by state law."). Moreover, although "[this] Court has . . . made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money," *Roth*, 408 U.S. at 571–72, it is not necessary to move beyond those general property tenets in this case. It is uncontroverted that IELHC, at all relevant

times, owned one hundred percent of the authorized, issued, and outstanding shares of IEL's stock. Accordingly, because IEL was and remains a wholly owned subsidiary of IELHC, *see* HAW. REV. STAT. § 431:11–102 ("'Subsidiary of a specified person' means an affiliate controlled by the person directly or indirectly through one or more intermediaries."), IELHC has a protected property interest in IEL. *See* HAW. REV. STAT. § 431:15–332 (setting forth the priority of distribution for claims against an insurer's estate and specifically recognizing "[t]he claims of shareholders" as part of the final distribution "class"); HAW. REV. STAT. § 431:15–307 (Subject to certain exceptions, the rights and liabilities of an insurer and its "creditors, policyholders, *shareholders*, members and all other persons interested in its estate shall become fixed as of the date of entry of the order of liquidation.") (emphasis added).

IELHC's constitutional right to due process itself provides the holding company with standing to oppose the Insurance Commissioner's liquidation petition. Specifically, because IELHC has a property interest in IEL, it cannot be deprived of that interest without due process of law. U.S. CONST. amend. XIV, § 1; *see Baker*, 443 U.S. at 145. The state government's involuntary liquidation of IEL—IELHC's wholly owned subsidiary—constitutes a "deprivation of property" such that due process attaches. *See Board of Governors of the Fed. Reserve Sys. v. D.L.G. Fin. Corp.*, 29 F.3d 993, 1002–03 (5th Cir. 1994) (freezing of sole shareholder's assets "unquestionably affected an important property interest" and created a "[substantial] risk of an erroneous deprivation"), *cert. dismissed*, 115 S. Ct. 1085 (1995). Therefore, regardless of the *amount* of due process required under the circumstances, IELHC is at least entitled to *some* modicum of due process before it can be deprived of

its property interest in IEL. It is that right to due process which gives rise to IELHC's standing to oppose the liquidation petition, and to deny IELHC that opportunity "for lack of standing," as the state court did in this case, is tantamount to depriving IELHC of its property interest without due process of law. *See Battaglia v. General Motors Corp.*, 169 F.2d 254, 257 (2d Cir.) (While Congress, and by analogy the Hawaii state legislature, "has the undoubted power to give, withhold, and restrict the jurisdiction of courts . . . , it must not so exercise that power as to deprive any person of life, liberty, or property without due process of law . . . ."), *cert. denied*, 335 U.S. 887 (1948).

In summary, while the Hawaii Supreme Court has recognized that it cannot sanction every challenge to governmental action, the court's "basic position has been that standing requirements should not be barriers to justice." *Life of the Land*, 623 P.2d at 439; *see Ariyoshi v. Hawaii Pub. Employment Relations Bd.*, 704 P.2d 917, 923 (Haw. Ct. App. 1985). The Hawaii courts thus have subscribed to the following "common sense position on standing requirements":

> Complexities about standing are barriers to justice; in removing the barriers the emphasis should be on the needs of justice. One whose legitimate interest is in fact injured by illegal action of an agency or officer should have standing because justice requires that such a party should have a chance to show that the action that hurts [its] interest is illegal.

Life of the Land, 623 P.2d at 439 n.8 (quoting Kenneth C. Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450, 473 (1970)). The standing touchstone therefore remains

"the needs of justice." *Ariyoshi*, 704 P.2d at 923 (citing *Life of the Land*, 623 P.2d at 441).

The foregoing principle applies with equal if not greater force in this context. IELHC had standing to oppose the Insurance Commissioner's petition to liquidate IEL, its wholly owned subsidiary, by virtue of IELHC's constitutional right not to be deprived of its property without due process of law. The Hawaii Supreme Court dismissed IELHC's appeal for lack of standing to oppose the liquidation petition, however, without so much as mentioning IELHC's assertion of standing on constitutional grounds. The "needs of justice" in this case require the Hawaii Supreme Court to step from behind the standing barrier and reach the merits of IELHC's assertions of error.

CONCLUSION

For the reasons stated herein, Petitioner IELHC respectfully requests that this Court grant this Petition for a Writ of Certiorari.

Respectfully submitted,

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